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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

GENERAL MOTORS CORPORATION,

Petitioner,

v.

ROGER W. TRACY, TAX COMMISSIONER OF OHIO,

Respondent.

On Writ of Certiorari to the Supreme Court of Ohio

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Does Ohio's use tax, which exempts gas purchased from local public utilities while taxing gas purchased out-of-State, discriminate against interstate commerce in violation of the Commerce Clause?

2. Does a purchaser of natural gas — which pays the use tax — have standing under the Commerce Clause to challenge such a use tax either in its own right or as a representative of vendors?

3. Does Ohio's discriminatory use tax violate the Equal Protection Clause?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the Ohio Supreme Court were General Motors Corporation and Roger W. Tracy, Tax Commissioner of Ohio.

Pursuant to Supreme Court Rule 29.6, Petitioner General Motors Corporation states that it has no parent companies. General Motors has several nonwholly owned subsidiaries, which are set forth in the Appendix to General Motors' petition for certiorari at pages 29a-35a.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Supreme Court of Ohio (Pet. App. 1a-5a)[1] is reported at 652 N.E.2d 188. The orders of the Supreme Court of Ohio denying reconsideration (Pet. App. 26a-28a) are reported at 655 N.E.2d 188. The relevant orders of the Ohio Board of Tax Appeals (Pet. App. 6a-19a) and Tax Commissioner of Ohio (Pet. App. 20a-25a) are unreported.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on August 9, 1995. A timely petition for reconsideration in that court was denied on October 4, 1995. On December 19, 1995, Justice Stevens extended the time for filing a petition for certiorari to and including February 1, 1996. The petition for a writ of certiorari was filed on February 1, 1996, and granted on April 1, 1996. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Commerce Clause of Article I, section 8 to the United States Constitution provides:

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides:

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[1] The following abbreviations are used throughout this brief: References to "Pet. App. ___" refer to the appendix to GM's petition for certiorari; references to "Pet. Opp. ___" refer to the respondent's brief in opposition to GM's petition; references to "J.A. ___" are to the Joint Appendix, which has been filed concurrently with this Court; and references to "Supp. ___" are to the Supplement (*i.e.*, the record on appeal) which was filed in the Ohio Supreme Court.

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Pertinent provisions of the Ohio Revised Code are set out in an appendix to this brief.

STATEMENT

This case involves Commerce Clause and Equal Protection Clause challenges to Ohio's sales and use tax scheme, which exempts from tax natural gas purchased from Ohio-based public utilities but taxes purchases from all out-of-state suppliers.

The Natural Gas Market. A purchaser of natural gas has essentially two choices of suppliers: (1) producers or marketers of natural gas, or (2) local distribution companies (local public utilities). As the Commissioner has previously explained, "[t]he players in the business of selling natural gas are natural gas marketers and natural gas utilities." Pet. Opp. 11. Producers of natural gas, most of whom are concentrated in the southwestern United States, extract the gas from underground reservoirs; marketers, as the name implies, market producers' gas. Local distribution companies (also known as LDCs) are local public utilities, such as The East Ohio Gas Company or Columbia Gas of Ohio, Inc. J.A. 100, 151-52, 157-58.

Until the last dozen years or so, interstate pipeline companies and local public utilities were barred from serving as common carriers of natural gas for producers and marketers. J.A. 203. As a consequence, producers almost never sold gas directly to consumers (the "burner-tip" market). J.A. 126. Rather, producers' gas was most often sold in the first instance to interstate pipeline companies, which transported and sold gas to public utilities. In turn, the utilities eventually sold the gas to the end user.[2]

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[2] *See* Breyer & MacAvoy, *The Natural Gas Shortage and the Regulation of Natural Gas Producers*, 86 Harv. L. Rev. 941, 944 (1973).

However, this prohibition on common carriage was lifted in the mid-1980's, first in Ohio with respect to local distribution, as a partial solution to natural gas shortages, and later, on the national level, with respect to interstate distribution, as part of the massive deregulation of the natural gas industry which occurred in the 1980s. J.A. 126, 193-94.[3] On the national level, deregulation began in earnest in 1986, when the Federal Energy Regulatory Commission (FERC), through its Order No. 436, lifted restrictions which, thereafter, allowed industrial buyers to negotiate their own contracts for natural gas.[4] The hallmark of Order No. 436 was its mandate of open access to interstate pipeline systems on a nondiscriminatory basis.[5] Order No. 436 was followed in 1992 by FERC Order No. 636, which continued the process of deregulation by requiring interstate pipelines to "unbundle" their gas-gathering operations and costs from their other operations and costs (*e.g.*, transportation). FERC's clear intent was to allow the "public [to] realize the full benefits of the competition at the wellhead," and to "create a regulatory environment in which no gas seller has a competitive advantage over another gas seller."[6]

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[3] *See generally* Pierce, *Natural Gas Regulation, Deregulation, and Contracts*, 68 Va. L. Rev. 63 (1982).

[4] Order No. 436, Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 50 Fed. Reg. 42,408 (1985) (codified in scattered sections of 18 C.F.R.), *aff'd in part and vacated in part, Associated Gas Distribs. v. FERC*, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988), *on remand*, Order No. 500, 52 Fed. Reg. 30,334 (1987).

[5] *See Northern Natural Gas Co.*, 48 F.E.R.C. (CCH) ¶ 61,232, at ¶ 61,828-29 (1989); *see also Associated Gas Distribs.*, 824 F.2d at 993-94.

[6] Order No. 636, Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 57 Fed. Reg. 13,267, 13,269 (1992).

One of the principal results of this deregulation was that all users and producers of natural gas — intrastate pipelines, local public utilities, and large end users — could employ interstate pipelines to transport gas from any supplier. Thus, interstate pipelines, once major merchants of natural gas, were removed from their traditional "middleman" role and now "operate almost exclusively as common carrier transporters."[7]

Such regulatory changes have allowed producers and marketers of natural gas to complete directly with local public utilities for sales of natural gas to burner-tip consumers. J.A. 203. Since entering the burner-tip market, producers and marketers of natural gas have been enormously successful. One of the principal reasons for this success is that, even with transportation costs, producers and marketers are able to sell at lower costs than local public utilities. J.A. 157, 194.[8] One marketer who testified before the Ohio Board of Tax Appeals in this action estimated that this manner of selling natural gas has grown from virtually zero in the early 1980s to "probably 80 or 90 percent of the gas that's consumed by industrial users" like General Motors ("GM"). J.A. 194.

General Motors' Activities. General Motors Corporation purchases natural gas used for power and heating purposes in its plants in Ohio. Since 1984, GM has bought natural gas directly from producers and marketers of natural gas outside of Ohio, arranging for its own transportation through interstate pipelines and local public utilities. J.A. 146. During the tax period in issue (January 1, 1987 through June 30, 1990), GM's Ohio plants purchased most of their natural gas requirements directly from out-of-state producers or marketers rather than buying gas from the Ohio-based public utilities which served its Ohio plants. J.A.

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[7] Fagan, *From Regulation to Deregulation: The Diminishing Role of the Small Consumer Within the Natural Gas Industry*, 29 Tulsa L. J. 707, 710 & n.6 (1994).

[8] *See also* Fritsch, *Tired of Phone Wars? Get Ready for a Fight To Sell Natural Gas*, Wall St. J., April 16, 1996, at A1.

156. GM purchased this gas from several sellers, including Mobil Natural Gas, Inc. (a wholly owned subsidiary of Mobil Oil Corporation), Yankee Resources, Inc. (now known as Access Energy Corporation), Rocky Mountain Energy Exchange, and Wellhead Enterprises, Inc. *See* J.A. 16-57; Supp. 227-611.

Under these contracts, GM acquired title to the gas at the point that the seller delivered the gas to the initial receiving pipeline; all of these delivery points were outside of Ohio. Pet. App. 1a. Under GM's contracts with Mobil Natural Gas, GM acquired the gas in Oklahoma, Louisiana and Texas. J.A. 30, 41-45; Supp. 250, 269-71, 282-85, 393, 416, 463, 483-91. Under GM's contract with Yankee Resources, GM acquired the gas in Texas and Louisiana. Supp. 514, 527-28. Under GM's contract with Rocky Mountain Energy Exchange, GM acquired the gas in Texas. Supp. 538, 549. And under GM's contract with Wellhead Enterprises, GM acquired the gas in Kansas, Louisiana, and Oklahoma. Supp. 580, 593-94, 599, 604, 607, 610. The producer or marketer delivered the gas to interstate pipeline companies in Texas, Oklahoma, Kansas or Louisiana, and GM then contracted with interstate pipeline companies and, ultimately, local public utilities in Ohio (The East Ohio Gas Company, in particular) for common carrier transportation of the gas through pipelines to GM's plants. *See* Pet. App. 1a. GM purchased from these out-of-state sources because they offered lower prices than the in-state utilities. J.A. 157; Supp. 202.

The Ohio Statutory Scheme. The state of Ohio imposes a 5-7% sales tax on goods purchased in Ohio, including natural gas. The state rate is 5%; local jurisdictions are permitted to levy an additional tax up to 2%, which is collected by the state. *See* Ohio Rev. Code Ann. §§ 5739.02, 5739.025. Similarly, the state imposes a 5-7% use tax on goods, including natural gas, purchased outside of Ohio but used in Ohio. *See* Ohio Rev. Code Ann. §§ 5739.025, 5741.02(A). Both the sales tax and the use tax are imposed on the purchaser. *See* Ohio Rev. Code Ann. §§ 5739.03, 5741.02. However, natural gas purchased from a "natural gas company" is exempted from sales tax. *See* Ohio

Rev. Code Ann. § 5739.02(B)(7).[9] Under the Ohio code, "[a]ny person . . . [i]s a natural gas company when engaged in the business of supplying natural gas for lighting, power, or heating purposes to consumers within this state." Ohio Rev. Code Ann. § 5727.01(D)(4).

As discussed below, the Ohio Supreme Court construed the Ohio Rev. Code Ann. § 5727.01(D)(4) definition of "natural gas company" to be limited to companies that "own or operate the transportation and distribution equipment and deliver the natural gas to consumers in Ohio." Pet. App. 3a. *See also Chrysler Corp. v. Tracy*, 652 N.E.2d 185, 187 (Ohio 1995). In other words, only purchases from Ohio public utilities are exempt from sales or use tax. The taxability of the sale or purchase thus depends not on the character of the seller as a public utility, but on whether the seller owns distribution equipment or facilities within the state and used such equipment or facilities to deliver the gas to the consumer. The consequence of the use tax exemption for Ohio public utilities is that they enjoy a 5-7% advantage over out-of-state producers and distributors of gas, and the purchasers from out-of-state sources suffer a similar disadvantage.

The Tax Commissioner's Assessment. For the audit period at issue here (October 1, 1986 to June 30, 1990), the Ohio Tax Commissioner assessed Ohio use tax upon GM's purchases of natural gas, with a minor exception not relevant to this case. Pet. App. 24a.[10]

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[9] Under Ohio law, sales and use tax does not apply to

> [s]ales of natural gas by a natural gas company . . . if [it] is delivered to consumers through . . . pipes, or conduits, . . . all terms as defined in section 5727.01 of the Revised Code.

Ohio Rev. Code Ann. § 5739.02(B)(7).

[10] That exception was for natural gas consumed at GM's plants directly in manufacturing tangible personal property for sales, which was exempt from tax under Ohio Rev. Code Ann. § 5739.01(E)(2)(now § 5739.011).

Proceedings Before The Board of Tax Appeals. GM appealed the Commissioner's final determination to Ohio's Board of Tax Appeals ("BTA"). On February 25, 1994, the BTA affirmed the Commissioner's denial of the claimed exemption. Pet. App. 6a-19a.

The BTA first held that GM's purchases were subject to tax under the statute. It held that the out-of-state "marketers and/or producers of gas" who sold the gas in question were not "natural gas companies" under Ohio Rev. Code Ann. § 5727.01. Pet. App. 10a, 13a. The BTA found "dispositive" its then-recent prior decision in *Chrysler Corp. v. Tracy*, B.T.A. Case No. 91-K-1523 (Jan. 21, 1994), in which the BTA

> concluded that a broker or marketer of natural gas, which did not produce natural gas, did not have the physical capabilities to transport natural gas to its customers, and which was not subject to regulation as a public utility, did not qualify as a "natural gas company" as that term is defined in R.C. 5727.01.

Pet. App. 13a (footnote omitted). Thus, under the BTA's construction of the statute, GM was not entitled to the use tax exemption because it was not purchasing its gas from a local public utility.

The BTA also rejected GM's "constitutional challenges with respect to the Tax Commissioner's application of a statute to a given set of facts," despite recognizing that under Ohio law the BTA "is without jurisdiction to determine the constitutional validity of a given statute." Pet. App. 15a.[11] It concluded that GM had not shown that application of the statute to GM's practices was unconstitutional. Pet. App. 15a-16a.

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[11] Under Ohio law, "the BTA receives facts but cannot rule on the [constitutional] question[s]." *MCI Telecommunications Corp. v. Limbach*, 625 N.E.2d 597, 599 (Ohio), *cert. denied*, 115 S. Ct. 77 (1994).

Proceedings Before The Ohio Supreme Court. GM appealed the BTA's decision to the Supreme Court of Ohio. In addition to again urging its statutory argument, GM argued that under the interpretation of "natural gas company" advanced by the Commissioner and adopted by the BTA, the use tax exemption was unconstitutional under the Commerce and Equal Protection Clauses of the United States Constitution. GM noted that the BTA's construction, which limited the definition of "natural gas companies" to companies having "the physical capabilities to transport natural gas to its customers," effectively limited the exemption to purchases from local public utilities while taxing all out-of-state purchases. As a result of this unconstitutional discrimination, GM argued, it was deprived of the use tax exemption and paid higher taxes as a result.

The Ohio Supreme Court's Decision. On August 9, 1995, the Ohio Supreme Court affirmed the Board of Tax Appeals. Based on its decision in *Chrysler Corp. v. Tracy*, 652 N.E.2d 185, decided that same day, the court rejected GM's statutory argument, holding that GM's vendors were not "natural gas companies" because they did not own distribution facilities within the state and did not deliver gas to customers in Ohio. Pet. App. 2a, 3a.

The court also rejected GM's Commerce Clause argument on two grounds. First, the court saw no impermissible discrimination in exempting only purchases from Ohio public utilities, since some in-state sellers — independent marketers of gas within Ohio — were also subject to tax:

> We have before us purchases by GM of natural gas from a company that does not own any production, transportation, or distribution equipment. The commissioner claims that he would tax purchases from these persons whether they sold natural gas in-state or out-of-state. Thus, the commissioner's application of the statute does not benefit in-state purchasers by favoring in-state vendors over out-of-state vendors; he treats purchases from both the same.

Pet. App. 4a.

Second, the court held that "on close inspection," GM was arguing that the application of the exemption statute "burdens out-of-state vendors of natural gas." *Id.* However, the court held that GM "lacks standing" to make this claim because it was not "a member of that class" of out-of-state vendors. *Id.*

The supreme court also rejected GM's Equal Protection challenge, which it viewed as "submerged in [GM's] Commerce Clause argument." *Id.*

GM moved for reconsideration in the Ohio Supreme Court. Reconsideration was denied on October 4, 1995. Pet. App. 26a-28a. This Court granted GM's petition for certiorari on April 1, 1996. J.A. 270.

SUMMARY OF ARGUMENT

"No state, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.'" *Boston Stock Exchange v. State Tax Comm'n,* 429 U.S. 318, 329 (1977) (*quoting Northwestern States Portland Cement Co. v. Minnesota,* 358 U.S. 450, 457 (1959)). Ohio's scheme of taxing out-of-state purchases of natural gas, while exempting purchases made from Ohio's own competing public utilities, violates this longstanding Commerce Clause principle.

Ohio's efforts to justify this discrimination against interstate commerce are untenable. The court below justified the discrimination on the basis that some in-state purchases of natural gas (from in-state producers and marketers) were also being denied the exemption; yet, at least since *Brimmer v. Rebman,* 138 U.S. 78 (1891), this Court has repeatedly rejected such justifications. *See C & A Carbone, Inc. v. Town of Clarkstown,* 114 S. Ct. 1677 (1994); *Fort Gratiot Sanitary Landfill v. Michigan Department of Natural Resources,* 504 U.S. 353 (1992); *Polar Ice Cream and Creamery Co. v. Andrews,* 375 U.S. 361 (1964); *Dean Milk Co. v. City of Madison,* 340 U.S. 349 (1951).

Nor could the sales and use tax on natural gas seriously be justified as "compensatory" for the tax which Ohio imposes on the gross receipts of its public utilities. The two taxes are imposed on different entities (the former, on the purchaser of gas; the latter, on the utilities), and the sales and use tax (5-7%) is higher than the gross receipts tax (4.75%). That justification would fail the compensatory tax test as most recently explained by this Court in *Fulton Corp. v. Faulkner*, 116 S. Ct. 848, 855-60 (1996).

Similarly, there is no merit to Ohio's efforts to justify the discrimination on the theory that Ohio has an interest in favoring its public utilities. This Court has uniformly struck down states' efforts to favor local businesses over other businesses dealing in interstate commerce, *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, or to favor goods purchased locally over goods purchased in other states. *Associated Industries of Mo. v. Lohman*, 114 S. Ct. 1815 (1994); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). Discrimination based on the means of delivery of out-of-state goods, whether by common carrier or by the seller's own distribution system, is also impermissible. For example, in a long line of cases, this Court has held that a state may not discriminate between sales by mail or common carrier and sales at retail. *E.g.*, *Associated Industries of Mo. v. Lohman*, 114 S. Ct. 1815. If this Court were to uphold Ohio's discriminatory treatment, states could discriminate against interstate commerce in a wide variety of situations.

The Ohio Supreme Court's apparent holding that GM lacked standing to challenge the discriminatory tax, because GM was not itself an out-of-state seller of natural gas, was also contrary to well-established law. The Commerce Clause prohibits discrimination against out-of-state goods as well as out-of-state taxpayers; in recognition of that principle, taxpayers who pay discriminatory taxes on out-of-state goods (such as GM), have uniformly been recognized to have standing to raise Commerce Clause challenges. And even if it could be said that GM was not raising its own Commerce Clause rights, but the rights of its out-of-state vendors,

GM would still have standing under this Court's *jus tertii* precedents.

Lastly, contrary to the holding of the court below, the discrimination also independently violates the Equal Protection Clause. Since the distinction which Ohio has drawn has an adverse impact on interstate commerce, heightened scrutiny would be appropriate. Under any level of scrutiny, however, the distinction could not pass muster under the Equal Protection Clause.

ARGUMENT

The Supreme Court of Ohio held in this case that a state may constitutionally provide an exemption from sales tax for purchases of natural gas from an in-state, local public utility, even though purchases of identical gas from any competitors outside of Ohio are never exempted from Ohio's complementary use tax. This holding is not consistent with either the Commerce Clause or the Equal Protection Clause.

I. THE OHIO SUPREME COURT'S HOLDING, THAT THE TAX IS CONSTITUTIONAL BECAUSE IT ALSO BURDENS SOME IN-STATE PURCHASES, IS UNTENABLE UNDER THE COMMERCE CLAUSE

This Court has long recognized that the Constitution "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935).[12] "The few simple words of the Commerce Clause" were the Framers' principal mechanism for ensuring that "the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation" would

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[12] Or, as Benjamin Franklin reputedly warned, "we must . . . all hang together, or most assuredly we shall all hang separately." R. Clark, *Benjamin Franklin* 286 (1983).

not be repeated under our current Constitution. *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979). Here, however, the Ohio taxing scheme implements precisely the "economic Balkanization" which this Court has long held unconstitutional — Ohio taxes out-of-state natural gas, but exempts gas purchased from its own public utilities. This system of taxation creates a preference for gas sold by an Ohio public utility — and, correspondingly, it creates a disincentive to purchase gas from any other source, including *all* out-of-state sources.

A. The Discriminatory Tax Cannot Be Saved Because It Also Discriminates Against Some In-State Commerce

In *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963), this Court held that when a state provides an exemption from sales tax, it must provide a strictly equal exemption from use tax for the same goods when purchased outside the state. *Id.* at 73. In taxing sales made by out-of-state sellers, a state thus must follow a "strict rule of equality" (*id.*), meaning that the use tax on goods purchased out-of-state may never exceed the sales tax on in-state sales. *Associated Indus. of Mo. v. Lohman*, 114 S. Ct. 1815, 1821 (1994). Here, however, the decision of the Ohio Supreme Court sanctioned the exemption from sales tax of in-state purchases of natural gas from local public utilities while out-of-state purchases were subjected to a use tax. This favoritism violates the Commerce Clause.

The Ohio Supreme Court, however, held that there was no discrimination here because in-state non-utility sellers were also subject to sales or use tax. This Court's cases hold uniformly to the contrary. In the seminal case of *Brimmer v. Rebman*, 138 U.S. 78 (1891), this Court established the proposition that a tax which discriminates against interstate commerce cannot be saved from unconstitutionality simply because it also disfavors a portion of in-state commerce. The Court in *Brimmer* held that a Virginia tax, which was imposed on meat slaughtered 100 miles or more from the place of sale, impermissibly discriminated against interstate commerce. The tax applied equally to sales of meat from animals which had been slaughtered in Virginia and

thereafter transported 100 or more miles within Virginia as well as to sales of meat from animals slaughtered in another state and transported 100 or more miles into Virginia. *See* 138 U.S. at 81-83. As the Court explained, it was immaterial that the taxing statute also disfavored some local commerce:

> The fees exacted, under the Virginia statute, for the inspection of beef, veal and mutton, the product of animals slaughtered one hundred miles or more from the place of sale, are, in reality, a tax; . . . . *Nor can this statute be brought into harmony with the Constitution by the circumstance that it purports to apply alike to the citizens of all the states, including Virginia*; for, "a burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute." *Minnesota v. Barber*, [136 U.S. 313, 326 (1890)]; *Robbins v. Shelby Taxing District*, 120 U.S. 489, 497 [(1887)].

Id. at 82-83 (emphasis added).

The rule of *Brimmer* has consistently been recognized and applied by this Court. *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951), invalidated a Madison, Wisconsin ordinance which forbade the sale of pasteurized milk in that city unless it had been pasteurized and bottled at an approved pasteurization plant "within a radius of five miles from the central portion of the City of Madison otherwise known as the Capitol Square." *Id.* at 350 & n.1 (internal quotations omitted). Like the statute at issue in this case, the Madison ordinance burdened *all* out-of-state product, and also burdened *some* in-state product. But that did not keep the ordinance from violating the Commerce Clause:

> It is immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce.

Id. at 354 n.4.

So too, in *Polar Ice Cream and Creamery Co. v. Andrews*, 375 U.S. 361 (1964), this Court unanimously held that a Florida statute (and regulations thereunder), which required a local milk processor and distributor to purchase to the extent possible all of its Class I milk requirements at a fixed price from producers located within a four-county marketing area, imposed an impermissible burden on interstate commerce. Even though producers from all of Florida's other counties were as disadvantaged as out-of-state producers, the Court unanimously held that the statute constituted an unconstitutional "embargo on out-of-state milk." *Id.* at 378.

Four Terms ago, this Court again applied the rule of *Brimmer* to strike down a Michigan law prohibiting landfill operators from accepting solid waste which originated outside the county of the landfill. *Fort Gratiot Sanitary Landfill v. Michigan Department of Natural Resources*, 504 U.S. 353 (1992). This Court, relying upon *Brimmer* and *Dean Milk*, held that Michigan's law, which favored only the small amount of in-state waste originating in the particular county, while disfavoring *all* out-of-state waste and *most* in-state waste, still violated the Commerce Clause. *Id.* at 361-63.

Even more recently, this Court applied the same rule to strike down a Clarkstown, New York, ordinance requiring that all solid waste be processed at that town's local transfer station before leaving the municipality. *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677, 1682 (1994). Relying expressly on *Dean Milk* and *Fort Gratiot*, this Court held that "the flow control ordinance discriminates, for it allows only the favored operator to process waste that is within the limits of the town. The ordinance is no less discriminatory because in-state or in-town processors are also covered by the prohibition." *Id.*

The same rule has been applied to strike down discriminatory state taxes where the discrimination favored only some local products. In *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), this Court considered a Hawaii sales tax which taxed all sales of liquor at wholesale, but exempted from the tax okolehao

(a brandy produced from a root native only to Hawaii) and pineapple wine. Other locally produced liquors, such as "sake and fruit liqueurs [were] not exempted from the tax." *Id.* at 265. This Court held the discriminatory exemption violative of the Commerce Clause, despite the fact that the exemption was also denied to some in-state liquors. "[T]he effect of the exemption is clearly discriminatory, in that it applies only to locally produced beverages, even though it does not apply to all such products." *Id.* at 271. The same is true of the Ohio exemption: it "applies only to locally-[sold gas], even though it does not apply to all such products."

Associated Industries of Mo. v. Lohman, 114 S. Ct. 1815, like *Bacchus,* also confirms the proposition that a tax which is only partial in its favoritism for in-state commerce is still unconstitutional. In *Associated Industries,* this Court struck down Missouri's use-tax scheme, which allowed local governments to impose their own sales taxes on top of the state-imposed sales and use taxes. In some Missouri counties, but not in all, the combined state and local use tax on out-of-state sales exceeded the state and local sales tax on in-state sales. This was unconstitutional because it violated the "strict rule of equality" articulated in *Halliburton,* 373 U.S. at 73. The tax was no less unconstitutional because the discrimination was isolated in certain counties and not statewide, or because, in some counties, in-state goods were actually subject to *higher* taxes than out-of-state goods.

In short, it is well established that, under the Commerce Clause, "[a] government cannot validate discrimination against a protected class . . . simply by subjecting some members of the nonprotected class to the same burden." Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause,* 84 Mich. L. Rev. 1091, 1230 (1986). The Ohio exemption scheme is fundamentally inconsistent with this established principle.

This Court has adopted a similar analysis under the Interstate Privileges and Immunities Clause of Article IV, § 2 of the

Constitution.[13] In *United Building & Construction Trades Council v. Mayor and Council of the City of Camden*, 465 U.S. 208 (1984), the Court held that a Camden, New Jersey ordinance, which required that 40% or more of the employees of contractors and subcontractors working on City projects be City residents, was invalid under the Privileges and Immunities Clause, even though New Jersey citizens not residing in Camden were also discriminated against. *See id.* at 217, 221-23. The Court noted that such a "blanket exemption for all classifications that are less than statewide would provide States with a simple means for evading the strictures of the Privileges and Immunities Clause," and "would effectively write the Clause out of the Constitution." *Id.* at 217-18 n.9. Even Justice Blackmun, who urged that the ordinance was valid under the Privileges and Immunities Clause because it applied to some in-state residents as well as out-of-state residents, agreed that such discrimination would be invalid under the Commerce Clause, because the national marketplace ensured by the Commerce Clause "is impermissibly undermined by local protectionism even when intrastate commerce is penalized as well." *Id.* at 235 n.16 (Blackmun, J., dissenting) (citing *Dean Milk Co. v. Madison*, 340 U.S. at 354 & n.4).

The taxing provisions at issue here are indistinguishable in principle from those state laws invalidated in *Brimmer, Dean Milk, Polar Ice Cream, Fort Gratiot, C & A Carbone, Bacchus*, and *Associated Industries*. Ohio has drawn the very line (favoring some in-state commerce while disfavoring all out-of-state commerce) which this Court has so often found impermissible. Were such discrimination permissible, states would be provided with a simple means for evading the strictures of the Commerce Clause by favoring some but not all in-state commerce. *Brimmer*,

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[13] The Privileges and Immunities Clause and the Commerce Clause possess a "shared vision of federalism." *Hicklin v. Orbeck*, 437 U.S. 518, 531-32 (1978). This "shared vision of federalism" no doubt derives from the two clauses' common origin in the fourth Article of Confederation. *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 379-80 (1978); *Austin v. New Hampshire*, 420 U.S. 656, 660 (1975).

138 U.S. at 83; *C & A Carbone*, 114 S. Ct. at 1682; *cf. United Building & Construction Trades Council v. Mayor and Council of the City of Camden*, 465 U.S. at 217-18 n.9. The preferential treatment of natural gas sales by local public utilities is invalid.

B. The Discrimination Cannot Be Justified On The Theory That The Use Tax On Out-Of-State Purchases "Compensates" For The Gross Receipts Tax On Local Public Utilities

Where, as here, a taxing statute facially discriminates against interstate commerce, a "virtually *per se*" rule of unconstitutionality applies.[14] *Oregon Waste Systems, Inc. v. Department of Environmental Quality*, 114 S. Ct. 1345, 1350 (1994); *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). However, Respondent has urged that the tax exemption scheme is constitutional because it was designed to compensate for the "gross receipts tax imposed on utilities generally (but not on unregulated gas marketers)." Pet. Opp. 11 n.3 (citing *Associated Industries of Mo. v. Lohman*, 114 S. Ct. at 1824-25). The state supreme court did not adopt this rationale, and the Tax Commissioner's argument is untenable — the sales and use tax is in no way "compensatory" for the gross receipts tax.

The test for a permissible compensatory tax is well established. As this Court has explained, most recently in *Fulton Corp. v. Faulkner*, 116 S. Ct. 848 (1996), "[t]he second prong of our analysis requires that 'the tax on interstate commerce . . . be shown roughly to approximate — but not exceed — the amount of the tax on intrastate commerce.' * * * * [T]he third prong of

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[14] It is irrelevant whether Ohio had an intent to discriminate, for "a court need not inquire into the purpose or motivation behind a law to determine that in actuality it impermissibly discriminates against interstate commerce." *Associated Industries of Mo. v. Lohman*, 114 S. Ct. 1815, 1824 (1994). *See also Philadelphia v. New Jersey*, 437 U.S. 617, 626 (1978) ("legislative purpose" is "not . . . relevant to the constitutional issue to be decided"); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 352-53 (1977).

compensatory tax analysis . . . requires the compensating taxes to fall on substantially equivalent events." *Id.* at 856-57 (citations omitted). Neither of these tests is satisfied here. For one, the two taxes are not even imposed on the same entity (the gross receipts tax is imposed upon the utility; sales and use taxes are imposed upon the purchasers of the gas). Ohio Rev. Code Ann. §§ 5741.02(B), 5727.33 (1996), 5727.38. For another, the rates of tax are different — sales and use tax is imposed at 5 to 7% of the gas's purchase price; the gross receipts tax is 4.75% of the utilities' gross receipts. Ohio Rev. Code Ann. §§ 5739.025, 5727.38. The scheme of taxation here thus fails the compensatory tax test. *Fulton Corp. v. Faulkner*, 116 S. Ct. at 855-60 & n.6; *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937).

C. The Discrimination Cannot Be Justified On The Theory That Ohio Has An Interest In Favoring Local Public Utilities

The Tax Commissioner, in another effort to sustain the discrimination, has urged that "the natural gas utility exemption has a reasonable basis, because by its nature the business of physically delivering natural gas to consumers is different from the business of brokering natural gas sales." Pet. Opp. 5. Respondent makes no claim that purchases from public utilities generally should be treated differently than purchasers from gas producers and distributors, and, indeed, he could not make such a claim since the exemption does not apply to purchases from out-of-state public utilities. Rather, the Tax Commissioner claims that the state may discriminate in favor of gas sold by local public utilities which are in "the business of physically delivering natural gas to consumers." Pet. Opp. 5. Apart from Respondent's compensatory tax argument (discussed above), he appears to argue that the differential treatment of purchases from local natural gas companies is appropriate because local natural gas

companies are more heavily regulated than producers and distributors.[15] Pet. Opp. 16.

This is nothing less than an argument that the state may afford favored treatment for unique local businesses, a proposition which has been uniformly rejected by this Court. With the deregulation of the natural gas industry, both local public utilities and non-utility sellers are competing directly with one another to sell natural gas in the burner-tip market.[16] *See supra* pp. 2-4. Non-

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[15] In opposing GM's petition for certiorari (Pet. Opp. 12-13), respondent relied on *Amerada Hess Corp. v. Director, Div. of Taxation*, 490 U.S. 66 (1989) to support its view that Ohio here is simply taxing different businesses differently, not discriminating against interstate commerce. Reliance upon *Amerada Hess* is misplaced. There, this Court upheld New Jersey's Corporation Business Tax as applied to several major oil companies. Each of the companies wished to deduct from its New Jersey taxable income its federal windfall profit taxes on crude oil production (which activities were not associated with New Jersey, but with oil-producing states). The companies argued that by denying the deduction for windfall taxes, the New Jersey tax violated each of the four prongs of the *Complete Auto* Commerce Clause test (*see Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977)). As to the "discrimination" prong of *Complete Auto*, the companies claimed that the tax discriminated "against oil producers who market their oil in favor of independent retailers who do not produce oil," and thus had no windfall profits. *Amerada Hess*, 490 U.S. at 78. This Court said that the companies' argument "miss[es] th[e] essential point" of the Commerce Clause (*id.* at 77), because state lines were irrelevant to a distinction between producers and retailers. The claimed discrimination rested on "the nature of their businesses," not "the location of their activities," since both producers and retailers "may operate both in New Jersey and outside the State." *Id.* at 78. No such distinction can be drawn here since the location of the exempt seller *is* determinative.

[16] As the *Wall Street Journal* has recently reported, these regulatory changes "have already meant savings for the largest customers. The Archdiocese of Chicago, for example, saved $8 million over the past five years for its 377 parishes by buying its gas from a unit of Houston-based Enron Corp. instead of local gas companies." Fritsch, *Tired of*

utility sellers, although relatively new to the marketplace, are competing quite successfully against the utilities, and it is not appropriate for Ohio to favor the in-state utilities who compete in the natural gas marketplace.

Ohio's tax preference for natural gas sold by its own public utilities, however, endeavors to give that local industry an impermissible "leg up" in the natural gas market, contrary to the ironclad rule that "[n]o State, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.'" *Boston Stock Exchange v. State Tax Comm'n,* 429 U.S. 318, 329 (1977) (*quoting Northwestern States Portland Cement Co. v. Minnesota,* 358 U.S. 450, 457 (1959)). As this Court has so often stated, when the effect of a state statute "is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry." *Brown-Forman Distillers Corp. v. New York Liquor Auth.,* 476 U.S. 573, 579 (1986). *See also Westinghouse Elec. Corp. v. Tully,* 466 U.S. 388, 406 (1984) (holding unconstitutional a franchise tax which favored sales made in-state and "burden[ed] commerce in other States in an attempt to induce 'business operations to be performed in the home State that could more efficiently be performed elsewhere.'") (*quoting Boston Stock Exchange,* 429 U.S. at 336).

In *Baldwin v. G.A.F. Seelig, Inc.,* 294 U.S. 511 (1935), Justice Cardozo dispatched a similar argument. There, the state argued that local milk farmers were uniquely qualified to assure "a regular and adequate supply of pure and wholesome milk," *id.* at 522-23, thus justifying a Milk Control Act favoring local

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Phone Wars? Get Ready for a Fight To Sell Natural Gas, Wall St. J., April 16, 1996, at A1. And now that the cost of transportation and delivery has been "unbundled" from the cost of gas, producers and marketers of gas are beginning to offer their goods to smaller gas buyers, such as homeowners. The result is that "more customers are getting a choice — and often a lower gas bill." *Id.*

farmers. As Justice Cardozo explained "[w]ith his characteristic eloquence" (*West Lynn Creamery, Inc. v. Healy*, 114 S. Ct. 2205, 2218 (1994)), such an exception would swallow the Commerce Clause whole:

> Let such an exception be admitted, and all that a state will have to do in times of stress and strain is to say that its farmers and merchants and workmen must be protected against competition from without, lest they go upon the poor relief lists or perish altogether. To give entrance to that excuse would be to invite a speedy end of our national solidarity. The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.

Baldwin v. G.A.F. Seelig, 294 U.S. at 523.

More recently, in *West Lynn Creamery*, 114 S. Ct. 2205, the Court rejected Massachusetts' argument that the "unique open space and related benefits" conferred upon the state by the Massachusetts dairy industry justified the tax/subsidy combination that favored in-state milk farmers. *Id.* at 2217 n.20. As the Court noted, to accept such an argument "would make a virtue of the vice that the rule against discrimination condemns. Preservation of local industry by protecting it from the rigors of interstate competition is the hallmark of the economic protectionism that the Commerce Clause prohibits." *Id.* at 2217.

Substantially the same argument was also rejected in *Bacchus*. The "ti root okolehao" industry was certainly unique to Hawaii (ti root being native to Hawaii), yet Hawaii was not allowed, consistent with the Commerce Clause, to favor that unique industry by making okolehao tax-exempt. *Bacchus*, 468 U.S. at 272.

Stripped of its rhetoric concerning the supposed special status of Ohio public utilities, the Tax Commissioner's argument boils down to this: A state may discriminate against goods which are

delivered into the state by common carriage rather than by the seller's own local distribution network. This argument has already been explicitly rejected by this Court in a long series of cases involving mail-order sales. Those cases made clear that mail-order sales, where the goods are delivered into the state by mail or common carrier, cannot be taxed at a higher rate than sales by retail establishments within the state.

The most recent of these cases is *Associated Industries v. Lohman*, 114 S. Ct. 1815, where some Missouri municipalities imposed a higher use tax on goods delivered into the state by mail and common carrier than the sales tax it imposed on goods sold locally at retail. This Court held the tax invalid under the Commerce Clause, because "[w]here the use tax exceeds the sales tax, the discrepancy imposes a discriminatory burden on interstate commerce. Out-of-state goods brought into such a jurisdiction are subjected to a higher levy than are goods sold locally. The resulting disparity is incompatible with what we have termed the 'strict rule of equality adopted in *Silas Mason.*'" *Associated Industries*, 114 S. Ct. at 1821. Even before *Associated Industries*, it was well established that a state could not discriminate between sales by mail or common carrier, and sales at retail. *See, e.g., Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64; *Maryland v. Louisiana*, 451 U.S. 725 (1981); *see also Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 115 S. Ct. at 1343 (a tax scheme may not "apply differently to goods and services purchased out-of-state" and brought in to the taxing state than to "those purchased domestically").

This Court has likewise repeatedly invalidated state laws which impose other forms of discriminatory taxation on distribution of goods from outside the state to points within the state. For example, in *West Point Wholesale Grocery Co. v. City of Opelika*, 354 U.S. 390 (1957), this Court invalidated an Alabama tax on the delivery of groceries at wholesale from points outside the locality, reasoning that a state could not impose a discriminatory tax (in that case a flat tax) on "the solicitation of orders and the subsequent delivery of goods at the end of an uninterrupted movement in interstate commerce, such a tax having

a substantial exclusory effect on interstate commerce." *Id.* at 391. If a state cannot impose a discriminatory tax on the delivery of goods from outside the state, it necessarily follows that it cannot impose a discriminatory tax on the seller's failure to itself deliver the goods inside the state.

Were Ohio's exemption scheme to be upheld, a giant loophole would be carved into the Commerce Clause. The Ohio Supreme Court's specific holding could be utilized to justify extensive discrimination between local public utility sellers and their competitors. This is not an issue unique to the natural gas marketplace. Deregulation in the electric and telephone markets has created, and will create, competition between traditional public utilities and new entrants. FERC, "[s]purred on by its experience of deregulating the natural gas industry and by the electric power shortages during the winter of 1993-1994"[17] is now in the process of restructuring the electric power industry. "[T]he common thread" running through FERC's deregulating and restructuring initiatives in both the natural gas and electricity markets is "the goal to foster greater competition" in the marketplace "by means of open access to transmission."[18] Similarly, the recently enacted Communications Act of 1995 has as one of its "primary objective[s] . . . to foster competition for local exchange and exchange access services"[19] by opening the marketplace "to allow competition for local telephone service by cable, wireless, long distance, and satellite companies, and

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[17] Pendley, *Deregulation of the Energy Industry*, 31 Land & Water L. Rev. 27, 61 (1996). *See also* Pierce, *The State of the Transition To Competitive Markets In Natural Gas and Electricity*, 15 Energy L. J. 323, 324-25 (1994).

[18] *Santa: F.E.R.C. No Moses, But Policies Are Guide For New Power Industry*, Inside F.E.R.C., Jan. 23, 1995, at 1 (internal quotations omitted).

[19] H.R. Rep. No. 104-204, 104th Cong., 1st Sess. 81 (1995).

electric utilities, as well as other entities."[20] Put simply, in these newly deregulated marketplaces, where national competition is favored as a matter of federal policy, state tax favoritism of the traditional local public utilities at the expense of new, out-of-state competitors is a substantial risk, and, if sustained, could stifle these newly competitive markets.

In addition, it is easy to imagine numerous other examples of tax discrimination that the Ohio Supreme Court's decision could be used to justify. Even in the non-utility context, out-of-state sellers of any goods, likely to lack distribution networks in states distant from their own, could be subjected to discriminatory taxation simply because they do not themselves transport the goods to the purchaser's doorstep. Ohio could apply the reasoning approved by the court below and exempt purchases of local newspapers delivered by the paper from sales tax, on the stated ground that those local papers utilize their own delivery services. Purchases of otherwise-similar national newspapers (*e.g., USA Today, The New York Times, The Wall Street Journal*), which contract with others for delivery services, would still be taxed. The result would plainly be favoritism of the local newspaper.

Next, Virginia could use the same logic to exempt sales tax on purchases of furniture from stores which deliver using their own delivery trucks. Virginia stores would be favored over stores in High Point, North Carolina, which are well known for selling furniture at deep discount prices, but ship their goods to buyers in other states by common carrier. The result: Higher-priced local furniture gains a tax advantage, distorting (or destroying entirely) the price advantage possessed by the North Carolina sellers. *Compare, e.g., West Lynn Creamery,* 114 S. Ct. 2211.

New York could then exempt from tax all milk sold in the state, but only if delivered by the milk producer's in-state distribution facilities. The effect of that tax, too, would be

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[20] S. Rep. No. 104-23, 104th Cong., 1st Sess. 5 (1995).

economic Balkanization, for Vermont milk producers simply do not have their own distribution networks in New York State. *Compare id.*

The discrimination here is particularly intolerable because the tax is not imposed on the seller's business, but on the purchase of natural gas. The gas sold by producers and marketers, and by local public utilities, is identical, and is delivered through identical pipelines. The gas which GM purchased, like the gas which public utilities sell, was delivered from the gas-producing areas of the United States through interstate pipelines, and then, in virtually all cases, through local distribution companies (public utilities), and to the consumer. *E.g.*, J.A. 41-42. *See also* Pet. Opp. 12, 15 (where the Commissioner notes that gas sold by out-of-state marketers and gas sold by local public utilities is physically delivered to the customer through the same facilities). Indeed, the gas is sold to identical buyers. Whether or not differential treatment of local public utilities and producers or marketers could ever be justified, there is no basis for a differential tax treatment of the natural gas itself as used by identical purchasers. As this Court noted just last Term, "States are barred from discriminating against foreign enterprises competing with local businesses . . ., and from discriminating against commercial activity occurring outside the taxing State." *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 115 S. Ct. at 1344-45. It is equally well established that "discrimination between in-state and out-of-state *goods* is as offensive to the Commerce Clause as discrimination between in-state and out-of-state *taxpayers*." *Bacchus*, 468 U.S. at 268 n.8 (emphasis added).

Plainly there can be no justification here for the discriminatory treatment.

D. General Motors Does Not Lack Standing To Challenge The Discrimination

The Ohio Supreme Court's second justification for its decision was equally erroneous. That court appeared to hold that GM, the taxpayer, had no standing to challenge the tax under the

Commerce Clause because "GM is not a member of that class" of "out-of-state vendors of natural gas." Pet. App. 4a. The supreme court reached this conclusion despite the fact that the Ohio use tax is imposed on consumers, such as GM. Ohio Rev. Code Ann. § 5741.02. Several decisions of this Court establish that this holding, too, was erroneous.

The Commerce Clause protects more than sellers; it also protects purchasers who wish to buy goods in the national marketplace. As Justice Jackson explained in the seminal case of *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525 (1949), the Commerce Clause not only protects "every farmer" and "every craftsman"; it also protects "every consumer":

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, *every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any.* Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

Id. at 539 (emphasis added). *See also West Lynn Creamery*, 114 S. Ct. at 2218 (same). The Commerce Clause protects the rights of all participants to "engage in commerce"; that clause confers "a freedom to trade with any State, to engage in commerce across all state boundaries." *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. at 335. Under the principles of these cases, a purchaser of out-of-state goods plainly has standing to challenge a discriminatory tax on Commerce Clause grounds. Indeed, where the incidence of the tax falls on the purchaser, as it does here, only the purchaser may have a sufficient incentive to challenge the tax.

The decision below is also at odds with this Court's specific holding in *Bacchus*. There, the state also urged that the petitioners lacked standing under the Commerce Clause.

Petitioners were wholesalers of liquor who were obliged by State law to add the 20% excise tax to their sales price, to collect the tax, and to remit it to the State. 468 U.S. at 266. The Court held that the wholesalers had standing in part because "they must return the tax to the State." *Id.* at 267. GM, too "must return the tax to the state"; that is enough for it to have standing to raise a Commerce Clause violation. Indeed, we are aware of no other case from this Court in which a payor of a tax was held to lack standing to challenge the constitutionality of that tax under the Commerce Clause.

The error of the decision below is further confirmed by recent decisions of this Court which have allowed in-state taxpayer-purchasers to bring Commerce Clause claims even though the "class" of businesses being discriminated against was a class of out-of-state sellers. In *Associated Industries,* where Missouri's use tax was at issue, one of the petitioners, Alumax Foils, Inc., was "a manufacturing firm in Missouri that pays the additional use tax on goods purchased from outside the state." 114 S. Ct. at 1819. Alumax and Associated Industries' Commerce Clause claim was successful; no "standing" problem with Alumax's claim was even adverted to by this Court or by the Missouri court below. *See Associated Industries v. Director of Revenue,* 857 S.W.2d 182 (Mo. 1993), *reversed*, 114 S. Ct. 1815 (1994).

In *West Lynn Creamery,* decided later that same Term, in-state milk *dealers* successfully brought a Commerce Clause challenge to a Massachusetts milk pricing order, even though the "class" being discriminated against was out-of-state milk *farmers*, from whom the in-state dealers purchased their raw milk supply. 114 S. Ct. at 2209. Again, no "standing" concerns were present. *See id.* at 2216 ("State taxes are ordinarily paid by in-state businesses and consumers, yet if they discriminate against out-of-state products, they are unconstitutional").

And in *Fulton Corp. v. Faulkner,* 116 S. Ct. 848, the petitioner, Fulton Corporation, was "a North Carolina company owning stock in other corporations that do business out of state." *Id.* at 852. Fulton Corporation successfully argued that North

Carolina's taxation of corporate stock according to the issuing corporation's exposure to the state income tax violated its Commerce Clause rights. Plainly Fulton Corporation, "a North Carolina company," was not itself a member of the discriminated-against class of foreign corporations issuing stock to be sold to North Carolina residents. *See id.* at 855 (the tax "favors domestic corporations over their foreign competitors in raising capital among North Carolina residents"). Yet, as a buyer of such stock, Fulton Corporation — the payor of the tax — was allowed to press its Commerce Clause challenge to the tax to a successful conclusion. *Id.* at 861. Each of these in-state petitioners had standing to press these (successful) Commerce Clause challenges to state taxes because each was injured by the discrimination against interstate commerce. The same can be said of GM here.

Moreover, GM would have had standing even if it had been raising rights belonging not to itself, but to the "class" of out-of-state sellers. Under this Court's "prudential" standing doctrine of *jus tertii,* GM also has standing to raise the constitutional rights of its sellers: (1) GM suffered an "injury in fact" by being forced to pay the discriminatory taxes; (2) buyers and sellers have a sufficiently close relationship to allow one to raise the rights of the other, *Craig v. Boren,* 429 U.S. 190, 195-96 (1976) (vendor allowed to raise equal protection rights of customers); and (3) the out-of-state sellers, who likely make only a minimal percentage of their sales in Ohio, and are not liable for the taxes in any event, would have little, if any, incentive to challenge the statute in their own name. *See generally Singleton v. Wulff,* 428 U.S. 106 (1976).

Plainly GM in this case was raising its own Commerce Clause-protected "'right' to engage in interstate trade free from restrictive state regulation." *Dennis v. Higgins,* 498 U.S. 439, 448 (1991). And even if the asserted "right" had belonged not to GM, but to the out-of-state sellers of gas, GM would have had standing to raise their rights as well. The contrary decision of the Ohio Supreme Court is untenable.

II. THE DISCRIMINATORY TAX ALSO VIOLATES THE EQUAL PROTECTION CLAUSE

As discussed in Section I above, the Ohio use tax as interpreted by that state's supreme court favors purchases of gas from in-state sellers of natural gas, specifically local public utilities. Although the Court need not reach GM's Equal Protection Clause challenge if it determines that the discrimination violates the Commerce Clause (*see, e.g., Kraft General Foods, Inc. v. Iowa Dep't of Revenue & Finance,* 505 U.S. 71, 82 n.25 (1992)), it is clear that the use tax exemption also violates the Equal Protection Clause by favoring those who purchase gas from in-state sellers, largely at the expense of customers engaged in interstate commerce such as GM.

The Equal Protection Clause is designed to assure that "all persons similarly circumstanced shall be treated alike." *Royster Guano Co. v. Virginia,* 253 U.S. 412, 415 (1920). Ohio treats those who purchase gas from out-of-state sources in a manner different from — and more harshly than — those who purchase gas from in-state public utilities, thus creating an unconstitutional classification. The Ohio Supreme Court's decision, which rejected GM's Equal Protection claim for the same reasons as it had rejected GM's Commerce Clause claim, was erroneous.

Under the Equal Protection Clause, taxing classifications "'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.'" *Allied Stores of Ohio v. Bowers,* 358 U.S. 522, 527 (1959) (quoting *Royster Guano Co. v. Virginia,* 253 U.S. at 415). Here, the classification is between natural gas sold by in-state utilities and natural gas sold by other types of sellers. The object of the legislation, Ohio apparently claims, is to recognize and compensate for the gross-receipts tax and regulatory burdens which the state imposes upon utilities. Pet. Opp. 16-17.

The differential tax treatment of the identical property — natural gas — would violate the Equal Protection Clause even under a rational basis standard, *see Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster Cty.,* 488 U.S. 336, 346 (1989),

because Ohio is taxing *identical* (not just "similar") property differently depending on the identity of the seller. Since the tax at issue is a sales and use tax on personal property, which is imposed upon and paid by the *buyer*, such a distinction, which is based on the identity of the seller, is irrational.

But because the classification employed by Ohio here implicates the constitutionally protected "'right' to engage in interstate trade free from restrictive regulation" (*Dennis v. Higgins*, 498 U.S. at 448), a closer judicial look is required. Although states are ordinarily accorded a wide latitude under the Equal Protection Clause in determining what and how to tax (*see Ohio Oil Co. v. Conway*, 281 U.S. 146, 159 (1930)), this latitude is significantly cabined when a discriminatory taxing scheme implicates other constitutional rights. "Classic examples are the taxes that discriminated against . . . interstate commerce (*see Michigan-Wisconsin Pipe Line v. Calvert*, 347 U.S. 157 [(1954)] or required licenses to engage in interstate commerce." *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 n.3 (1973). Similarly, in *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985), this Court expressly held "that promotion of domestic business within a State, by discriminating against foreign corporations that wish to compete by doing business there, is not a legitimate state purpose." *Id.* at 880.

This requirement of heightened judicial scrutiny where a taxing distinction burdens the right to engage in interstate commerce is consistent with the rule that distinctions which implicate another constitutionally protected right, such as the right to travel, are subject to enhanced Equal Protection Clause scrutiny:

> Whenever a state law infringes a constitutionally protected right, we undertake intensified equal protection scrutiny of that law. * * * * It is well established that . . . where a law classifies in such a way as to infringe constitutionally protected fundamental rights, heightened scrutiny under the Equal Protection Clause is required.

Attorney General of New York v. Soto-Lopez, 476 U.S. 898, 904, 906 n.6 (1986) (plurality opinion) (citations omitted). *See*

Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (interstate commerce); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985) (right to travel); *Williams v. Vermont*, 472 U.S. 14 (1985) (same).

In sum, the tax not only violates the Commerce Clause; it also violates GM's equal protection rights.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Ohio should be reversed.

Respectfully submitted,

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STATUTORY APPENDIX

Ohio Revised Code Annotated § 5727.01, entitled **"Definitions,"** provides in pertinent part:

As used in this chapter:

(A) "Public utility" means each person referred to as a telephone company, telegraph company, electric company, natural gas company, pipe-line company, water-works company, water transportation company, heating company, rural electric company, or railroad company.

* * * *

(D) Any person:

* * * *

(4) Is a natural gas company when engaged in the business of supplying natural gas for lighting, power, or heating purposes to consumers within this state; . . . .

Ohio Revised Code Annotated § 5727.33, entitled **"Determination of gross receipts,"** provides in pertinent part:

(A) For the purpose of computing the public utility excise tax, the tax commissioner shall ascertain and determine the entire gross receipts actually received from all sources, excluding the receipts described in divisions (B), (C), and (D) of this section, of each electric, rural electric, natural gas, pipe-line, water-works, heating, and water transportation company for business done within this state for the year ending on the thirtieth day of April, and of each telegraph and telephone company for business done within this state for the year ending on the thirtieth day of June.

(B) In ascertaining and determining the gross receipts of each of the companies named in this section, the commissioner shall exclude all of the following:

(1) All receipts derived wholly from interstate business;

(2) All receipts derived wholly from business done for or with the federal government;

(3) For the year ending April 30, 1990, and each subsequent year, all receipts derived wholly from the transmission or delivery of electricity to or for a rural electric company, provided that the electricity that has been so transmitted or delivered is for resale by the rural electric company;

(4) All receipts from the sale of merchandise;

(5) All receipts from sales to other public utilities, except railroad, telegraph, and telephone companies, for resale, provided the other public utility is required to file a statement pursuant to section 5727.31 of the Revised Code.

Ohio Revised Code Annotated § 5727.38, entitled **"Excise tax on gross receipts of certain public utilities,"** provides:

On or before the first Monday of November, annually, the tax commissioner shall assess an excise tax against each public utility except railroad companies. The tax shall be computed by multiplying the gross receipts as determined by the commissioner under section 5727.33 of the Revised Code by six and three-fourths per cent in the case of pipe-line companies and four and three-fourths per cent in the case of all other companies. The minimum tax for any such company for owning property or doing business in this state shall be ten dollars. The assessment shall be certified to the taxpayer and treasurer of state.

Ohio Revised Code Annotated § 5739.02, entitled **"Levy of sales tax; purpose; rate; exemptions,"** provides in pertinent part:

For the purpose of providing revenue with which to meet the needs of the state, for the use of the general revenue fund of the state, for the purpose of securing a thorough and efficient system of common schools throughout the state, and for the purpose of affording revenues, in addition to those from general property taxes, permitted under constitutional limitations, and from other sources, for the support of local governmental functions, and for

the purpose of reimbursing the state for the expense of administering this chapter, an excise tax is hereby levied on each retail sale made in this state.

(A) The tax shall be collected pursuant to the schedules in section 5739.025 of the Revised Code.

The tax applies and is collectible when the sale is made, regardless of the time when the price is paid or delivered.

* * * *

(B) The tax does not apply to the following:

* * * *

(7) Sales of natural gas by a natural gas company, of electricity by an electric company, of water by a water-works company, or of steam by a heating company, if in each case the thing sold is delivered to consumers through wires, pipes, or conduits, and all sales of communications services by a telephone or telegraph company, all terms as defined in section 5727.01 of the Revised Code;

* * * *

Ohio Revised Code Annotated § 5741.02, entitled **"Levy of tax; rate; exemptions,"** provides in pertinent part:

(A) For the use of the general revenue fund of the state, an excise tax is hereby levied on the storage, use, or other consumption in this state of tangible personal property or the benefit realized in this state of any service provided. The tax shall be collected pursuant to the schedules in section 5739.025 of the Revised Code.

(B) Each consumer, storing, using, or otherwise consuming in this state tangible personal property or realizing in this state the benefit of any service provided shall be liable for the tax, and such liability shall not be extinguished until the tax has been paid to this state; provided that the consumer shall be relieved from further liability for the tax if the tax has been

paid to a seller in accordance with section 5741.04 of the Revised Code or prepaid by the seller in accordance with section 5741.06 of the Revised Code.

(C) The tax does not apply to the storage, use, or consumption in this state of the following described tangible personal property or services, nor to the storage, use, or consumption or benefit in this state of tangible personal property or services purchased under the following described circumstances:

(1) When the sale of property or service in this state is subject to the excise tax imposed by sections 5739.01 to 5739.31 of the Revised Code, provided said tax has been paid;

(2) Except as provided in division (D) of this section, tangible personal property or services, the acquisition of which, if made in Ohio, would be a sale not subject to the tax imposed by sections 5739.01 to 5739.31 of the Revised Code;

(3) Property or services, the storage, use, or other consumption of or benefit from which this state is prohibited from taxing by the constitution of the United States, laws of the United States, or the constitution of this state. This exemption shall not exempt from the application of the tax imposed by this section the storage, use, or consumption of tangible personal property which was purchased in interstate commerce, but which has come to rest in this state, provided that fuel to be used or transported in carrying on interstate commerce which is stopped within this state pending transfer from one conveyance to another is exempt from the excise tax imposed by this section and section 5739.02 of the Revised Code . . . .